

**REPORT TO THE TWENTY-SECOND LEGISLATURE
STATE OF HAWAII
2004**

**PURSUANT TO ACT 185, 2003 LEGISLATIVE SESSION
REQUIRING THE DEPARTMENT OF HEALTH AND THE HAWAII REAL ESTATE
COMMISSION TO CONDUCT A STUDY ON THE IMPACT AND FEASIBILITY OF
ALLOWING CONDOMINIUM AND COOPERATIVE HOUSING CORPORATION
PROJECTS TO BECOME LICENSED ASSISTED LIVING FACILITIES**

**PREPARED BY:
STATE OF HAWAII
DEPARTMENT OF HEALTH
DECEMBER 2003**

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INTRODUCTION

Since August, 1999, assisted living facilities have been required to obtain a license from and be regulated by the Department of Health (DOH) in accordance with Hawaii Revised Statutes Section 321-15.1 and HAR Title 11, Chapter 90.

With the aging of Hawaii's population, questions have been raised about allowing condominiums and cooperative housing corporation projects to become licensed as assisted living facilities to provide assisted living services for residents.

Act 185 of the 2003 legislative session required the DOH and the Hawaii Real Estate Commission to conduct a study and report to the 2004 legislature on the impact and feasibility of such licensing. (Exhibit A)

SUMMARY OF FINDINGS AND RECOMMENDATIONS

- A. Licensing of condominiums and cooperative housing corporation projects as assisted living facilities is not a significant problem. There is little, if any, interest among existing projects and new projects can be handled through the existing laws and procedures.
- B. The area of greater concern is permitting projects without liability, to identify owners and residents which may need assisted living services and directing those identified to such services.
- C. Any project which provides assisted living services, whether directly or through another person or entity, should be licensed.
- D. Any providers of assisted living services should be licensed.

ADVISORY GROUP PROCESS

An advisory group was formed including interested and knowledgeable persons from the community. A list of participants is included as Exhibit B. The group met on eight (8) occasions from July, 2003 to November, 2003. A public informational briefing was held on October 14, 2003 at the State Capitol Auditorium to discuss the work of the committee. (Exhibit C)

AGING IN PLACE

The current and projected increase in the number of seniors in Hawaii is well recognized. The overwhelming preference of seniors is to remain in their homes until a need for an acute level of care arises and hospitalization is required. Then, the goal is to return home as soon as possible. However, with the limitations that aging imposes, staying in one's home – or "aging in place" – becomes possible only if assistance is available to these seniors. The nature and scope of the required assistance varies case by case and individual by individual but invariably will include at least some assistance with one's activities of daily living (ADL) or instrumental activities of daily living (IADL) that are often taken for granted. And, as the aging continues, the need of assistance increases and becomes essential to the senior's safety and health of others in the condominium or cooperative housing community in which the senior resides. Further, there may come a time when the needed level of substitute care assistance adequately be provided in one's home.

ONE KALAKAUA SENIOR LIVING

Interest in the condominium/cooperative housing assisted living issue was prepared by a few owners/residents at the One Kalakaua Senior Living Project. One Kalakaua pre-dates DOH regulation of assisted living facilities. It is unique; there is no other project in Hawaii which was designed, built, and marketed for seniors as a condominium or co-operative providing services which would require a DOH issued assisted living facility license. This was recognized in the Condominium Public Report which specifically noted that the project provided services and amenities not ordinarily found in a condominium.

DOH determined that if One Kalakaua was going to continue to provide the “assistance in living” services it had been providing since it opened in 1997, it needed to obtain an assisted living facility license as per Title 11 Chapter 90. One Kalakaua decided through its governing body, its Board of Directors, to do so and it was issued a provisional license effective August 8, 2002 until April 30, 2003, and a full license which expires April 30, 2005.

While the ALF license became required after One Kalakaua’s development, the project has had various licenses relating to its senior services from inception. For example, its skilled nursing facility (currently leased to a vendor) was always licensed under Title 11 Chapter 94 Intermediate Care/Skilled Nursing Facility (SNF), as was its kitchen facilities under Title 11 Chapter Food Establishment Code, which are used for all residents, as well as the skilled nursing patients.

The issues involving One Kalakaua are the subject of pending litigation. Since the circumstances of this project are unique and the interpretation of its governing documents is presently being determined in court, it should not be the basis for legislative action.

NEW PROJECTS

A variety of “senior living” developments have been proposed. The Hawaii Real Estate Commission can and is prepared to address the concerns regarding licensing, insurance, owner liability, allocation of fees and other matters in the usual course of its review. It should also be noted that some of the largest senior housing involving assisted living services is being developed outside of the condominium and cooperative housing corporation ownership models. The Real Estate Commission may also look to descriptions of condominium models and cooperative housing corporation models of senior living communities which offer a continuous care and health services not found in a typical condominium or cooperative housing model.

CONVERSION OF EXISTING PROJECTS

There is little, if any, interest among condominiums and co-operative housing corporations in becoming licensed as assisted living facilities. There is, however, considerable concern by association owners and residents regarding the needs of the residents of these projects who may require assistance as they age and that assistance be available so that a resident may continue to remain in one's home as long as possible.

This concern is admirable and the willingness to seek a way to meet an aging resident's needs is an important part of any system that will be successful in fostering aging in place. The issue of licensing is really a distraction from the core issue: how should DOH and other state agencies regulate the provision of assisted care and health services to the elderly. The elderly are easily exploited and are at great risk for serious harm and even abuse from sub-standard services.

Licensing of assisted living services is essential to protecting the elderly. Exempting condominiums and co-operatives from licensing, solely because of legal status, exposes the very people the projects are seeking to help, from the protection that they need.

RESPONSES TO SPECIFIC QUESTIONS/CONCERNS

- A. The existing definition of "assisted living services" is appropriate for condominium or cooperative housing corporation projects. The nature of ownership of the housing services does not change the need for licensing.
- B. Providing assisted living services will have an impact on liability and worker's compensation insurance availability and cost. It will not affect property/casualty insurance. It will, however, also have an impact on the potential liability of the owners and directors of a project. It is important to recognize that this impact is not the result of the license; it is the product of providing the services. In choosing between licensed and unlicensed services, a project with a license, however, is in a better position relating to insurance and liability because DOH provides some independent assurance of quality through surveys, on-going monitoring and a process for immediate responses to complaints and problems.
- C. The impact of licensing on property and resale values is uncertain. In the case of One Kalakaua, the units sold at a premium because of the bundle of senior services promised. The building had originally been marketed unsuccessfully as a conventional condominium without assisted living and other senior services. The impact on other projects is uncertain and would be only speculation.
- D. The issue of apportionment of costs and fees between the individual owners of the project and the Association is best decided on a case-by-case basis. There is so much variation in the type and range of services provided that it is impossible to effectively generalize.
- E. The licensing of vendors that would provide assisted living services to residents of a condominium or cooperative housing corporation project is under the jurisdiction of the DOH through its licensing of home health agencies as set forth in Title 11 Chapter 97 Home Health Agencies.

LIABILITY REDUCTION FOR PROJECTS

In order to meet the needs of project residents while limiting the liability of the project, one proposal is to permit “splitting” existing owner’s associations. This has been analyzed in detail and appears to be unworkable. An analysis of the issue and options is provided as Exhibit D.

There are, however, other options to address the recurring concern over allowing a project to provide at least a basic response to the needs of its residents relating to aging and aging in place. An amendment to Chapter 514A would provide a good faith limitation on liability in limited circumstances as follows:

A. Purpose of Additional Language to Chapter 514A:

To limit the liability of Condominium Associations and their Directors and Condominium Owners and their agents and condominium residents, acting through an Association Board of Directors, regarding actions and assessments and recommendations by an Association’s Board of Directors with respect to elderly condominium residents/(elderly being defined as age 62 and over) who, in order to live independently, appear to require services and assistance in order to maintain independence without posing any harm to oneself or to others, and without being disruptive to the condominium community.

B. Problems of Residents Aging and Aging in Place in a Condominium:

Problems that an elderly condominium apartment resident confronts with respect to aging and to aging in place include, but are not limited to:

- 1) Being unable to clean and maintain an independent unit.
- 2) Being mentally confused.
- 3) Being abusive to others.
- 4) Being unable to care appropriately for oneself.
- 5) Being unable to arrange for home care.
- 6) Feeling very alone and neglected.
- 7) Making inappropriate requests of others for assistance.

C. Barriers to Assessing and Helping Elderly Residents in a Condominium:

Barriers that a Condominium Association and its Board and apartment owners and residents confront with respect to an elderly resident who is aging and aging in place and who is experiencing one or more of the above noted problems are:

- 1) An elderly resident who is afraid to talk about his, her, or their problems.
- 2) Denial by an elderly resident that a problem exists.
- 3) An inability to assess reported problems with an elderly resident and an inability to recommend programs and services to help an elderly resident alleviate a problem or problems with respect to aging, aging in place and related elderly challenges.
- 4) Legal liability and much higher insurance costs for all involved if owners and residents, through the Association's Board, attempt to assess problems and to see that services are provided for an elderly resident.
- 5) An inability to present in a legal forum, if needed, recommended programs and services for those elderly residents who are experiencing physical and cognitive disabilities and chronic health problems that make it difficult for such an elderly resident to live independently in his/her/their condominium apartment without help, and without posing any harm to oneself or to others, and without being disruptive to the condominium community.

The proposed amendment to Chapter 514A which is included as Exhibit E would be a useful step in allowing projects to assist residents without taking on liability.

EXHIBIT A

ACT 185

2000-2000 DHCA

S.B. NO.

1492
S.D. 1
H.D. 2
C.D. 1

RELATING TO ASSISTED LIVING FACILITIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

8 (1) A new definition of "assisted living services" that
9 would be provided in a condominium or cooperative
0 housing corporation project that becomes licensed as
1 an "assisted living facility," taking into
2 consideration that such projects would differ from
3 other assisted living facilities in the provision of
4 housing services;

15 (2) Liability insurance, including cost, availability and
16 access to financing, and effect of conversion on
17 property and resale values;

Hawaii State Legislature 2003 Legislative Session

SB1492 SD1 HD2 CD1

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Measure Title: RELATING TO ASSISTED LIVING FACILITIES.

Report Title: Assisted Living Facilities; Impact and Feasibility Study; Temporary Moratorium on Issuance of New Licenses for Condominiums or Cooperative Housing Corporation Projects to Become Assisted Living Facilities

Description: Requires the department of health (DOH) and the real estate commission to conduct a study and report to the 2004 legislature on the impact and feasibility of allowing condominiums and cooperative housing corporation projects to become licensed as assisted living facilities to provide assisted living services for residents. Imposes a moratorium on the issuance by DOH of any new license for any condominium or cooperative housing corporation project as an assisted living facility, until the legislature acts on the report submitted by the department of health and the real estate commission, or 7/1/04, whichever occurs first. (CD1)

Package: None

Companion:

Introducer(s): FUKUNAGA

Current Referral: HLT/HSB, CPC

Date		Status Text
1/24/2003	S	Introduced and passed First Reading.
1/27/2003	S	Referred to HMS.
2/14/2003	S	Bill scheduled to be heard by HMS on 02-21-03 at 2:45 pm in conference room 016.
2/21/2003	S	The committee on HMS deferred the measure until 02-26-03 at 2:45 pm in conference room 016.
2/26/2003	S	The committee(s) on HMS recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in HMS were as follows: 4 Aye(s): Senator(s) Chun Oakland, Fukunaga, Ige, Trimble; Aye(s) with reservations: none ; 0 No(es): none; and 3 Excused: Senator(s) Inouye, Hooser, Tsutsui.
2/28/2003	S	Reported from HMS (Stand. Com. Rep. No. 768) with recommendation of passage on Second Reading, as amended (SD 1) and placement on the calendar for Third Reading. Report adopted; Passed Second Reading, as amended (SD 1).
2/28/2003	S	48 Hrs. Notice 03-04-03.
		Passed Third Reading, as amended (SD 1). Ayes, 24; Aye(s) with reservations:

3/4/2003	S	none . Noes, 0 (none). Excused, 1 (Senator(s) Ihara). Transmitted to House.
3/4/2003	H	Received from Senate (Sen. Com. No. 212) in amended form (SD 1).
3/6/2003	H	Pass First Reading
3/10/2003	H	Referred to HLT/HSB, CPC, FIN, referral sheet 23.
3/11/2003	H	Bill scheduled to be heard by HLT/HSB on Thursday, 03-13-03 at 8:45 am in House conference room 329.
3/13/2003	H	Re-referred to HLT/HSB, CPC, referral sheet 26.
3/13/2003	H	The committees on HLT recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 7 Ayes: Representative(s) Arakaki, Hale, Shimabukuro, Takai, Ching; Ayes with reservations: Representative(s) Finnegan, Stonebraker; 0 Noes: none; and 3 Excused: Representative(s) Nishimoto, Kahikina, Takumi.
3/13/2003	H	The committees on HSB recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 8 Ayes: Representative(s) Shimabukuro, Arakaki, Hale, Kawakami, Takai, Ching; Ayes with reservations: Representative(s) Finnegan, Stonebraker; 0 Noes: none; and 3 Excused: Representative(s) Kahikina, Nishimoto, Takumi.
3/18/2003	H	Reported from the committee on HLT/HSB (Stand. Com. Rep. No. 952) as amended in (HD 1), recommending passage on Second Reading and referral to the committee on CPC.
3/18/2003	H	Passed Second Reading as amended in (HD 1) and referred to the committee(s) on CPC with Representative(s) Blundell, Fox, Jernigan, Leong, Meyer, Moses, Ontai voting no and Representative(s) Bukoski, Herkes, Pendleton, Souki excused.
3/22/2003	H	Bill scheduled to be heard by CPC on Monday, 03-24-03 at 2:30 pm in House conference room 325.
3/24/2003	H	The committee(s) recommends that the measure be deferred until 3/31/2003.
3/28/2003	H	Scheduled for decision making on Monday, 03-31-03 at 3:00 pm in conference room 325.
3/31/2003	H	The committee(s) recommends that the measure be deferred until 4/2/2003.
4/2/2003	H	The committees on CPC recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 10 Ayes: Representative(s) Hiraki, Herkes, Caldwell, Chang, Ito, B. Oshiro, Souki, Finnegan, Marumoto, Thielen; Ayes with reservations: none; 0 Noes: none; and 5 Excused: Representative(s) Kanoho, Lee, M. Oshiro, Sonson, Stonebraker.
4/4/2003	H	Reported from the committee on CPC (Stand. Com. Rep. No. 1430) as amended in (HD 2), recommending passage on Third Reading.
4/4/2003	H	Forty-eight (48) hours notice Tuesday, 04-08-03.
4/8/2003	H	Passed Third Reading as amended in (HD 2) with none voting no and Representative(s) Halford excused.
4/8/2003	H	Transmitted to Senate.

4/10/2003	S	Received from House (Hse. Com. No. 493).
4/10/2003	S	Senate disagrees with House amendments.
4/10/2003	H	Received notice of disagreement (Sen. Com. No. 637).
4/13/2003	H	House conferees appointed: Arakaki, Kahikina, Hiraki Co-Chairs; Stonebraker.
4/15/2003	S	Received from House (Hse. Com. No. 565).
4/16/2003	S	Senate Conferees appointed: Chun Oakland, Chair; Menor, Co-Chair(s); Espero, Fukunaga, Trimble.
4/16/2003	H	Received notice of Senate conferees (Sen. Com. No. 735).
4/21/2003	S	Bill scheduled for conference committee meeting on 04-22-03 at 3:00 pm in conference room 016.
4/22/2003	S	Conference committee meeting to reconvene on 04-23-03 at 3:00 pm in conference room 016.
4/23/2003	S	Conference committee meeting to reconvene on 04-24-03 at 11:30 AM in conference room 016.
4/24/2003	S	Conference committee meeting to reconvene on 04-24-03 at 3:30 pm in conference room 016.
4/24/2003	H	The Conference Committee recommends that the measure be Passed, with Amendments. The votes were as follows: 3 Ayes: Representative(s) Arakaki, Kahikina, Hiraki; Ayes with reservations: none; 0 Noes: none; and 1 Excused: Representative(s) Stonebraker.
4/24/2003	S	The Conference committee recommends that the measure be PASSED, WITH AMENDMENTS. The votes of the Senate Conference Managers were as follows: 4 Aye(s): Senator(s) Chun Oakland, Menor, Fukunaga, Trimble; Aye(s) with reservations: none ; 0 No(es): none; and 1 Excused: Senator(s) Espero.
4/24/2003	S	Reported from Conf. Com. as amended CD 1 (Conf. Com. Rep. No. 70).
4/24/2003	H	Reported from Conference Committee (Conf Com. Rep. No. 70) as amended in (CD 1).
4/24/2003	H	Forty-eight (48) hours notice 04-29-03.
4/25/2003	H	Forty-eight (48) hours notice Tuesday, 04-29-03.
4/29/2003	S	Passed Final Reading, as amended (CD 1). 18 Aye(s); Aye(s) with reservations: none . 4 No(es): Senator(s) Hemmings, Hogue, Slom, Whalen. 3 Excused: Senator (s) Bunda, Hanabusa, Taniguchi.
4/29/2003	H	Passed Final Reading as amended in (CD 1) with none voting no and Hiraki, Marumoto excused.
4/30/2003	H	Received notice of Final Reading (Sen. Com. No. 815).
5/1/2003	S	Received notice of House agreement and passage on Final Reading (Hse. Com. No. 614).
5/2/2003	S	Enrolled to Governor.

6/19/2003	H	Act 185, on 6/16/2003 (Gov. Msg. No. 418).
6/19/2003	S	Act 185, 6/16/2003 (Gov. Msg. No. 618).

\$ = Appropriation measure

ConAm = Constitutional Amendment

EXHIBIT B

ADVISORY GROUP PARTICIPANTS

ADVISORY GROUP PARTICIPANT

Name	Background
David Andrew, M.D.	Physician
Kenneth Chong	Real Estate Developer
Camille Chun-Hoon	Executive Office on Aging
Lois Ekimoto	Hawaiiana Management Company
David Fitzgerald	Pohai Nani
Steve Glanstein	Community Association Institute
Mitchell Imanaka	Real Estate Commssion, Attorney (Imanaka, Kudo & Fujimoto)
Karen Iwamoto	Hawaii Association of Realtors
Calvin Kimura	Real Estate Commission
Alicia Maluafiti	AARP Hawaii
Tricia Medeiros	The Plaza at Punchbowl
Frances Nishioka	Palolo Chinese Home
Robert Ogawa	Hawaii Long Term Care Association
Dianne Okumura	Department of Health
Margaret Salvador	Arcadia
Pat Sasaki	Executive Office on Aging
Surita Savio	Insurance Associates
Jean Seki	Wells Fargo
Karen Thorp	Arcadia
Emmet White	Arcadia
Suzie White	Arcadia
James Wright	Attorney
Cynthia Yee	Real Estate Commission

EXHIBIT C

INFORMATIONAL BRIEFING

ATTENDEES PRESENTATIONS

Sign In Sheet

Name	Organization/Mailing Address	Phone (optional)
Louis T. Norris	1-K 1314 Kalakaua #1113	983-9846
My Le Robert	1-K 1314 Kalakaua #1010	983-4646
Surita Savio	Ins. Associate	526-1271
Tricia Medeiros	The Plaza at Punchbowl	792-8800
Jean Seki	Wells Fargo Home Mtg	952-5009
Ken Chong	Task force member	524-1505
Ursula S. Mann	1-K 1314 Kalakaua #1412	947-2940
Kay Kong	1-K 4314 Kalakaua #514	983-4629
Lucy Cagala	1-K 1314 Kalakaua #1010	983-4884
Carrie Kung	1-K 1314 Kalakaua #306	983-4884
MARGARET A. O'NEAL	1-K 1314 Kalakaua #306	946-7198
Flettie Vierra	Wilson In Home	516-4486
Barbara Yoshitaka	DOH	
Maryrose Roldan	DOH	692-7407
Shirley N. Souza	DOH / CHH	692-7412
MARTITA BLITZ	ONE K	983-4567
MARIE PELL	One K	946-1289
Lloyd Namihira	" "	986-4689
Virgil Meeker	" "	941-6855
Emmet White	Arcadia	981-1823
Surie White	Arcadia	983-1847
Frances Nishioaka	Palolo Chinese Home	732-0488
Karen Thorp	Arcadia	983-1841
MARGARET SALVADOR	ARCA DIA	983-1854
ALICE DWIGHT	ONE KALAKAU	983-4640
CHARLES DWIGHT III	ONE KALAKAU	983-4640

SICK IN SHEET

NAME	Organization/Mailing ADDRESS	PHONE Optimal
Ellen Bethell	1314 Kalakaua #810	983-4653
Steve Glawson	P.O. Box 22885 HM 96823	423-6766
Clady Helkesh	1314 Kalakaua, #107	983-4607
Ally H. Edwards	1314 Kalakaua, #107	983-4606
Basilan Ruyge	932 Ward Ave #430 Honolulu 96814	521-8961
Gynethun Jue	Real Estate Comm'n	586-26-48
Jane Taura	1314 Kalakaua #601	983-4851
Juki Taura	1314 Kalakaua Ave #601	983-4851
Domino Kuwahara		
TAKASHI KUWABARA	1314 KALAKAUA AVE #511	983-4623
Alicia Maluafiti	AARP	545-6005
Venus R. Llanto	Bobtanaka Inc, 1055 Kal. pl. sk. 200	949.4111x24
CT Hayashida	2233 Ala Mahanui St ALOHA HAWAII PO Box 22597 Hon HI 96823-2597	721-1201
Francis Lum	1314 Kalakaua #1509	983-4890
Bertha Lum	1314 Kalakaua #1509	983-4890
Marvin N. Vaught	1314 Kalakaua #910	983-4615
Senator Roz Baker	Capitol #220	586-6070
WILLIAM J. HUMMEL	HAWAII EDER CARE ADVISORS 1001 BISHOP ST STE 955 HON. HI 96813	533 1270 ext 12
FRANK S O O N	ONE K	983 4614
CALVIN KIMURA	P.O. 2505 KING ST #202 Honolulu HI 96813	586-2643
Rosanna Evers	WCHE-86-260 Farrington Wahiawa, HI 96792	696-4944
Albert Hillman	ONE KALAKAUA	983-4543
CHRYOME L. FUKINO	DOH	
MARY YAMAKAWA	1314 KALAKAUA AVE #1104	983 4885
KATHERINE C. AKONA	1314 KALAKAUA AV. #408	983-4587

Sign in Sheet

Name

organization/mailing
address

Phone - (optional)

Nancy W. Au
Arthur P. Au

1318 Kalakaua Ave #1205

983-4868

1318 Kalakaua Ave #1205

983-4868

10/14/03 Info Briefing Act 185

- | | | |
|----------------------------|----------------------------------|---------------|
| 1. SHIRLEY N. SOUZA | OOH/OHCA- | 692-7412 |
| 2. Ken Chong | Task force | 524 1505 |
| 3. Venus Llanto | Bob Tanaka, Inc. | 949. 4111, 24 |
| 4. WILLIAM J. HUMMEL | HAWAII ELDER CARE ADVISORS | 533 1270 X12 |
| Dennis Arakaki | State Legis | 586-6050 |
| 6. Leigh-Wai Do | Palo Chinese Home | 739 6033 |
| 7. RA Payzer | HAA (HCH) | 521-8961 |
| 8. Paothi Dies W. Linberg | ALOH (Assisted Living Options H) | 266-1046 |
| 9. Chandra Chandra | DOH / EOA | 586-7309 |
| One Kalakaua Senior Living | | 9834400 |

Informational Briefing on Act 185 Relating To Assisted Living Facilities

Pursuant to the mandate of Act 185 the Department of Health and the Real Estate Commission will present information on the impact and feasibility of allowing condominium and cooperative housing corporation projects to become licensed as Assisted Living Facilities to provide Assisted Living services for its residents, with Questions and Answers to follow.

Date: Tuesday, October 14, 2003

Time: 9:00 a.m. — 11:00 a.m.

Place: State Capitol Auditorium

- Overview of Ramifications of Splitting the Association in Two
Steve Glanstein, Community Associations Institute
- Overviews of Insurance Ramifications
Sarita Savio, Insurance Association, Inc.
- Overview of the Lendor's Perspective
Jean Seki, Wells Fargo Home Mortgage, Inc.
- Overview of the Fee Structure
David Fitzgerald, Pohai Nani
- An Association Void of Liability
Emmet White, Arcadia
- Licensing of Vendors
Dianne Okumura, Office of Health Care Assurance
- Recodification of Condo Laws
Gordon Arakaki, Department of Commerce and Consumer Affairs
- Definition of Assisted Living Facilities
Robert Ogawa, Hawaii Long Term Association
- Comments
Dr. Jane K. Kadohiro, Dr.P.H., APRN, CDE, Deputy Director of Health

Written comments will be accepted by close of business October 28, 2003. Please submit two copies to:

Dianne Okumura, Chief
Office of Health Care Assurance
c/o 1250 Punchbowl Street, Room 237
Honolulu, Hawaii 96813

Act 185 Impact and Feasibility Study

Presented by:



The Purpose of our Task Force:

The department of health and the real estate commission shall conduct a study on the impact and feasibility of allowing condominium and cooperative housing corporation projects to become licensed as assisted living facilities to provide assisted living services for its residents.

Tricia Medeiros
Executive Director



Act 185 Impact and Feasibility Study

Today's Agenda:

1. Ramifications of splitting the association into
2. Insurance ramifications
3. Lenders perspective
4. Fee structure
5. Association void of liability
6. Licensing of vendors
7. Recodification of condo law
8. Definition of Assisted Living Services
9. Comments

Ramifications of splitting the association into

Presented by:
Steve Glanstein

Insurance Ramifications



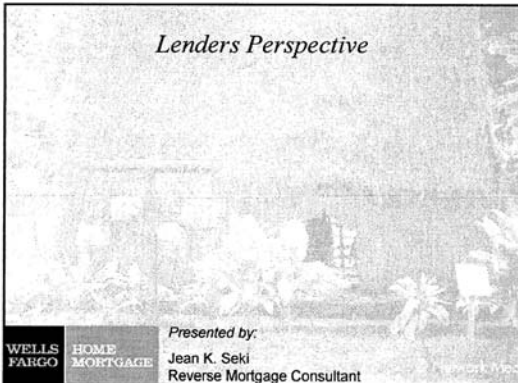
- Cost
- Availability and access
- Effect of conversion



Presented by:
Sue Savio, President

Coverage	Limits	Term	Policy Period	Annual Premium (Basic Condo)	Annual Premium (ALF)
Property		Annual	07/11/03 - 07/11/04	\$ 16,004	\$ 18,655
Building Replacement Cost	\$ 16,055,740				
Deductible	\$ 2,000				
Hurricane Deductible (% of Building Value)	\$ 325,115				
Comprehensive General Liability		Annual	07/11/03 - 07/11/04	\$ 9,311	\$ 21,850
General Aggregate	\$ 3,000,000				
Products & Completed Operations Aggregate	\$ 1,000,000				
Personal & Advertising Injury	\$ 1,000,000				
Each Occurrence	\$ 1,000,000				
Fire Damage	\$ 50,000				
Medical Expense (any one person)	\$ 5,000				
Hired/Non-Owned Automobile (recurrence)	\$ 1,000,000				
Deductible	\$ 10,000				
Commercial Umbrella		Annual	07/11/03 - 07/11/04	\$ 3,795	\$ 4,800
Each Occurrence	\$ 5,000,000				
Liability Aggregate Limit	\$ 5,000,000				
Retained Limit	\$ 0				
Boiler & Machinery		Annual	07/11/03 - 07/11/04	\$ 1,437	\$ 1,437
Covered Amount	\$ 16,255,740				
Deductible	\$ 1,000				
Directors' and Officers' Liability		Annual	07/11/03 - 07/11/04	\$ 2,593	\$ 4,500
Each Occurrence	\$ 2,000,000				
General Aggregate	\$ 2,000,000				
Deductible	\$ 1,000				
Fidelity Bond		Annual	07/11/03 - 07/11/04	\$ 531	\$ 531
Each Occurrence	\$ 100,000				
Deductible	\$ 1,000				
Workers' Compensation		Statutory	Annual	\$ 9,356	\$ 9,356
Professional Liability		Annual	07/11/03 - 07/11/04	\$ 52,000	\$ 52,000
Each Occurrence	\$ 1,000,000				
Aggregate	\$ 3,000,000				
Deductible	\$ 0				

Lenders Perspective



WELLS FARGO HOME MORTGAGE

Presented by:
Jean K. Seki
Reverse Mortgage Consultant

Financing an Assisted Living Facility Unit

Financing is essential to homeownership and encouraged, thus owning a home is possible for qualifying borrowers through the normal conventional mortgage loan programs presently available by most lenders.

New purchase or refinance lending programs are available from most lenders on an approved condominium.

Financing a unit in an Assisted Living Facility(ALF)

Financing is available to borrowers if the unit is in an approved ALF complex.

- Type of loan: conventional

- Examples of an approved ALF: One Kalakaua Senior Living (Fee Simple)

Financing a unit in a condominium complex with Assisted Living Services:

Presently, there are no lenders who will finance a condominium with a formal or established assisted living service program; these types of condominium currently do not fall in the "approved condo" category.

Criteria to obtain an "approved condo" status

Eligibility requirements:

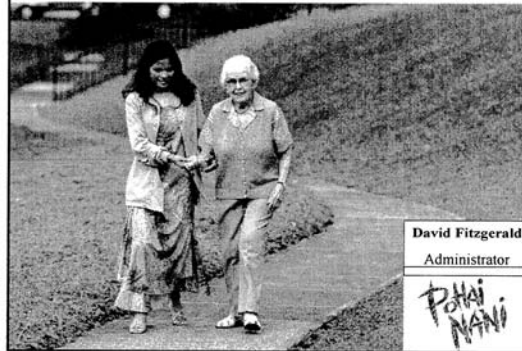
- Project must meet the general condominium guidelines
- Declaration of Covenant
- Conditions and Restrictions
- Bylaws
- Insurance

Financing Summary

Issues that have been discussed and are being proposed for consideration through this task force will pave the way for:

- Seniors who have resided in their apartments for many, many years to age gracefully and independently in their own home
- Anyone needing assistance to obtain assisted living services in their own condominium unit
- Owners to tap the equity in their home through a lender-financed mortgage loan

Fee Structure



Assumptions for the Case Study:



- Condo has experienced aging in place.
- A minority of the residents require assistance.

*Our financial model is based on a **10 unit licensed assisted living facility** operated within an existing condo.*

Assisted Living is Specialized Housing

- *Requires specialized knowledge and training*

Some of the AL Regulations:

- Twenty- four hour on-site direct staff
- Licensed nursing staff shall be available seven days a week
- Three meals a day, seven days a week, including modified diets
- Recreational or social activities are to be made available to residents on a daily basis
- ...assist the individual in achieving and maintaining the highest state of positive well-being (i.e., psychological, social, physical and spiritual) and functional status.

Labor is the Greatest Cost:

Minimum staffing requirements for 10 Assisted Living beds

Position	Hrs per week	Notes	Hourly Wage	Annual wage	Annual wage plus benefits
Admin / DON (RN)	40	1 FTE	\$ 26.00	\$ 54,080	\$ 76,304
Assistant (LPN)	40	1 FTE	\$ 16.00	\$ 33,280	\$ 43,264
CNA (Day shift)	56	1 per shift	\$ 10.00	\$ 29,120	\$ 37,856
CNA (Evening shift)	56	1 per shift	\$ 10.00	\$ 29,120	\$ 37,856
CNA (Night shift)	56	1 per shift	\$ 10.00	\$ 29,120	\$ 37,856
Housekeeping	28	4 hrs day	\$ 8.50	\$ 12,376	\$ 16,089
Cooks	42	6 hrs day	\$ 9.00	\$ 19,656	\$ 25,553
				\$ 206,752	\$ 268,778



Expense Summary	Annual Cost
Wages and Salaries	\$ 268,778
Administrative Exp.	\$ 77,940
Nursing Services	\$ 6,900
Pharmacy	\$ 600
Activity Services	\$ 4,200
Laundry / Housekeeping	\$ 3,480
Dietary	\$ 48,605
Operations / Maintenance	\$ 4,980
Total	\$ 415,482

Expense Breakdown

Annual wages and benefits	\$ 268,778
Other Expenses	\$ 146,705
Total	\$ 415,482



Points to consider about this model

- **Costly: Poor economy of scale**

- Some fixed expenses change very little (insurance)
- Contracted Home Care is far more cost effective

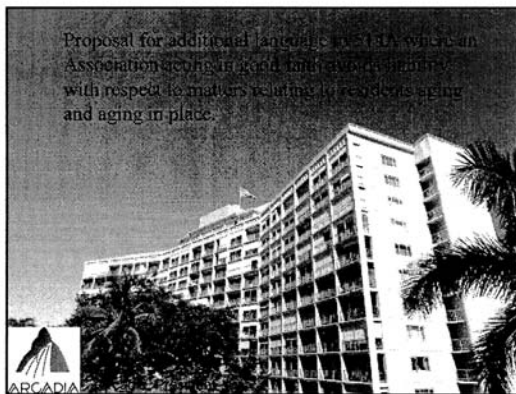
- **Would this type of model be able to deal with the difficult issues?**

Reality: 40 to 50 percent of the residents in Assisted living may have some form of dementia.

Fact: Alzheimer's Disease is the leading cause of dementia.

Percentage with Alzheimer's	
Age	% with AD
64 to 74	2 to 3%
75 to 84	15%
85 +	30 to 40%

Proposal for additional language to be added to the Association's governing documents with respect to matters relating to residents aging and aging in place.



Problems of Residents Aging and Aging in Place in a Condominium

- Inability to clean and maintain unit
- Mentally confused
- Abusive to others
- Unable to care for self
- Unable to arrange for self care
- Feeling alone and neglected
- Inappropriate requests for assistance

Barriers to Assessing and Helping Elderly Resident in a Condominium

- Fear of discussing personal difficulties/problems
- Denial of condition/situation
- Inability of Association to assess problems and/or refer to resources
- Possible Legal liability and increased costs
- Inability to present recommended programs/services in a legal forum

Limiting Liability

- No liability for reports, observations, complaints and recommendations
- No liability for assessments and recommendations
- No affirmative duty regarding assessments and recommendations
- No liability for actions filed
- Costs for assessments, recommendations and actions

Licensure as Assisted Living Facility

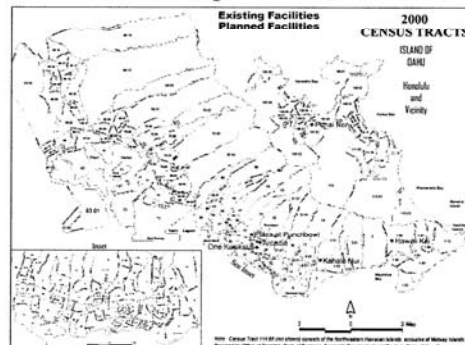
- Condos or associations acting within the above parameters will not be required to meet requirements of title 11 Chapter 90 Hawaii Administrative Rules dealing with the licensure of an Assisted Living Facility.

Licensing Vendors to provide assisted living services



Presented by:
Dianne Okumura
Office of Health Care Assurance, Chief

Assisted Living Facilities in the area



Home Health Agency

The current alternative is not enough:

- Title 11 Chapter 97 State Regulations
- Provide direct or indirect **skilled nursing services** and other **therapeutic services** under a physician's direction to homebound patients in their home
- In addition to providing nursing services shall provide at least one other therapeutic service (PT, OT, Speech, Medical Social Services or home health aide)

Home Health Agency (continued)

- **Federal Certification** to receive Medicare and/or Medicaid reimbursement for services rendered
- **Certificate of Need is required** if the agency is requesting Federal Certification

Home Care: *A fresh approach*

- Currently no regulations for licensure of such entities if they do not meet the criteria for Home Health Agencies
- However, OHCA is working with SHPDA and HCAH/Home Health-Hospice Services to:
 - Establish a new system whereby State licensure can be effected without the requirement for a CON
 - Amendment to the current rules will be done to include this provider type to ensure the health, welfare and safety of individuals receiving services

Assisted Living Vendor

- The committee feels that a new vendor type is not necessary due to the existence of Home Health Agencies and Home Care Agencies
- Should Condominiums or Cooperative Housing Units identify that an individual requires services, there should be established a system for providing information to that individual so that they can make their own arrangements to access services

Accessing Services

- The management or Association shall not negotiate, coordinate or provide services, if licensure as an Assisted Living Facility is not being sought or obtained
- The individual shall access services on their own behalf and develop an agreement with the agency to receive the services as directed by their Physician

Condominium Law Recodification *Hawaii Real Estate Commission*

The definition of Assisted Living

Chapter 90 Regulations

Assisted Living Facility:

This facility shall consist of a building complex offering dwelling units to individuals and services to allow residents to maintain an independent assisted living lifestyle. The environment of an assisted living facility shall include one in which meals are provided, staff are available on a 24-hour basis and services are based on the individual needs of each resident.

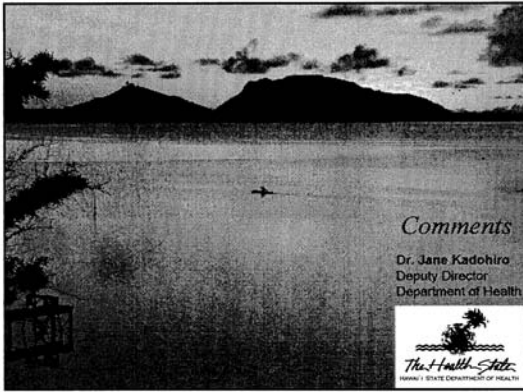


Presented by:
Bob Ogawa, President
Hawaii Long Term Care Association

Purpose of Assisted Living Facilities Licensure

- To ensure the health, welfare and safety of residents
- Provide combination of housing, meal services, health care services and personalized supportive services to meet individual needs
- Allow for aging in place





Proposal for additional language to 514A where an Association acting in good faith avoids liability with respect to matters relating to residents aging and aging in place

1. Purpose of Additional Language:

To limit the liability of Condominium Associations and their Directors and Condominium Owners and their agents and condominium residents, acting through an Association Board of Directors, regarding actions and assessments and recommendations by an Association's Board of Directors with respect to elderly condominium residents/(elderly being defined as age 62 and over) who, in order to live independently, appear to require services and assistance in order to maintain independence without posing any harm to oneself or to others, and without being disruptive to the condominium community.

2. Problems of Residents Aging and Aging in Place in a Condominium:

Problems that an elderly condominium apartment resident confronts with respect to aging and to aging in place include, but are not limited to:

- 1) Being unable to clean and maintain an independent unit.
- 2) Being mentally confused.
- 3) Being abusive to others.
- 4) Being unable to care appropriately for oneself.
- 5) Being unable to arrange for home care.
- 6) Feeling very alone and neglected.
- 7) Making inappropriate requests of others for assistance.

3. Barriers to Assessing and Helping Elderly Residents in a Condominium:

Barriers that a Condominium Association and its Board and apartment owners and residents confront with respect to an elderly resident who is aging and aging in place and who is experiencing one or more of the above noted problems are:

- 1) An elderly resident who is afraid to talk about his, her, or their problems.
- 2) Denial by an elderly resident that a problems exists.
- 3) An inability to assess reported problems with an elderly resident and an inability to recommend programs and services to help an elderly resident alleviate a problem or problems with respect to aging, aging in place and related elderly challenges.
- 4) Legal liability and much higher insurance costs for all involved if owners and residents, through the Association's Board, attempt to assess problems and to see that services are provided for an elderly resident.
- 5) An inability to present in a legal forum, if needed, recommended programs and services for those elderly residents who are experiencing physical and cognitive disabilities and chronic health problems that make it difficult for such an elderly resident to live independently in his/her/their condominium apartment without help, and without posing any harm to oneself or to others, and without being disruptive to the condominium community.

4. Limiting Liability for Actions taken by an Association and its Members:

- a) No liability for reports, observations, complaints and recommendations:
The Association, its Directors, Apartment Owners and their agents and residents, acting through an Association's Board, shall not have any legal responsibility or legal liability, with respect to any actions and recommendations the Board takes on any report, observation, or complaint made, or with respect to any recommendation or referral given, which relates to an elderly condominium resident who, because of the problems of aging and aging in place herein enumerated, may require services and assistance to maintain independent living in the condominium unit in which the elderly resident resides so that the resident will not pose any harm to oneself or to others, and will not be disruptive to the condominium community

- b) No liability for assessments and recommendations:

Upon a report, observation or complaint relating to an elderly resident aging or aging in place which notes a problem similar in nature to the problems herein enumerated, the Board may, in good faith, and without legal responsibility or liability, request a functional assessment regarding the condition of an elderly resident as well as recommendations for the services which the elderly resident may require to maintain a level of independence that enables such resident to avoid any harm to oneself or to others, and to avoid disruption to the condominium community. The Board may, upon request, or unilaterally, and without legal responsibility or liability, recommend available services to an elderly resident which might enable such elderly resident to maintain a level of independent

living with assistance, enabling in turn, such elderly resident to avoid any harm to himself or herself, or others, and to avoid disruption to the condominium community.

c) No Affirmative Duty regarding assessments and recommendations:

There is no affirmative duty on the part of the Association, its Board, nor on the condominium apartment owners or apartment residents to request or require an assessment and recommendations with respect to an elderly condominium apartment resident when he or she may be experiencing the problems related to aging and aging in place herein enumerated. The Association, its Board, apartment owners and residents are not legally responsible nor liable for not requesting or declining to request a functional assessment of, and recommendations for, an elderly resident regarding problems relating to aging and aging in place.

d) No liability for actions filed:

In the event an elderly resident ignores or rejects a request for, or the results from, an assessment and recommendations, the Association, with no liability for cross-claims or counterclaims, may file appropriate information, pleadings, notices, or the like, with appropriate agencies and/or courts to seek an appropriate resolution for the condominium community and for the elderly resident.

e) Costs:

Matters relating to costs for assessments and recommendations as herein contemplated, and relating to costs and fees for actions as herein

contemplated are left to the discretion of the Association as more particularly set forth in the Association Bylaws.

5. No Effect on Condominiums Seeking to be Licensed as an Assisted Living Facilities:

This section shall not be applicable to any condominium that seeks to become licensed as an assisted living facility pursuant to Chapter 90, Title 11, Hawaii Administrative Rules, as amended.

EXHIBIT D

RAMIFICATIONS OF “SPLITTING” AN EXISTING ASSOCIATION

Ramifications of Splitting an Existing Association

This report is a response to the August 26, 2003 request for a brief analysis of issues relating splitting an association into two associations and providing residents with the option to move back and forth between the two associations.

1. Jurisdiction issues. This would create two separate associations. Logically it would also create two boards of directors. This presents numerous issues. Some of them are:
 - a. Which association's declaration or bylaws would control the operation of the property?
 - b. What if there were differences between the two sets of documents?
 - c. Which board would have authority to implement house rules?
 - d. What is the economic cost of maintaining two boards of directors making potentially different decisions about the same property?
 - e. How do you reconcile different declaration or bylaw amendments that affect common areas, voting rights, etc.?
 - f. Associations need to perform a reserve study to determine the costs of repair and/or replacement of common areas. Two associations would require two reserve studies. Even if only one was performed, association boards could make different decisions about the financial operations of the association. This leads back to jurisdictional issues related to the maintenance and operation of the common elements.
2. The principle of providing "residents" with an option to move back and forth between a "standard association" and an "assisted living association" would provide uncertainty about the allocation of costs.

Residents are not necessarily owners. The owners are ultimately responsible for payment of maintenance fees and other assessments.

The nonowner resident is not entitled to more rights than the unit owner. Therefore any movement between the two associations that affect an ownership interest would require the owner's approval.

The effect on a landlord-tenant arrangement must be carefully evaluated. The expectations for an assisted living environment can change and landlord-tenant disputes can become health and legal issues.

3. The owner's percentage of common interest could change. State law provides that the allocation of maintenance fees to units is based upon the percentage of common interest. (HRS §514A-15) If individuals can "opt out" then two options:
 - a. recalculate percentage of common interest; or
 - b. redistribute financial costs among remaining units without a recalculation of the percentage of common interest.

The statute does provide an exception for allocation of costs and expenses based upon the use of apartments as commercial or residential. However, this use is required to be in the declaration of the association. (HRS §514A-11(7)) The placement of this use in the declaration would prohibit alteration of the use without an amendment to the declaration.

4. The percentage of common interest represents what is known as an undivided interest in the common areas of the property.

Common areas may include entrance ways, elevators, the building wiring, concrete structure, swimming pool, etc. These areas are generally an undivided part of the building.

It would not be feasible to physically divide the common elements based upon a unit's ownership interest. (HRS §514A-13)

5. Recalculation of the percentage of common interest affects at least:
 - a. an individual's ownership percentage;
 - b. an individual's voting rights at association meetings;
 - c. the value of any mortgagee's security;
 - d. rights to amend the fundamental organizational documents (declaration and bylaws);
 - e. monthly maintenance fees;
 - f. assessments; and
 - g. property rights if the property is demolished and there is no repair.

Any state statute that permits the recalculation of this percentage must be analyzed against the federal requirements for mortgage loans. (Refer to Fannie Mae requirements related to percentages of common interest.) This will require legal assistance from competent counsel.

The percentage of common interest is related to state requirements for an association to borrow money. (HRS §514A-82.3)

The percentage of common interest is related to state requirements for an association to alter the use of the common elements (e.g. , modify a pool room to be an exercise room). (HRS §514A-82.3)

The percentage of common interest is related to various requirements for conversion of property from leasehold to fee-simple. (HRS §514A-90.6)

6. A reduction of an individual's ownership percentage may constitute a "taking of property" and may require appropriate compensation.

An increase in an individual's ownership percentage may lead to an unanticipated maintenance fee increase.

7. Another option is to redistribute the financial costs without recalculation of the percentage of common interest.

This would violate most association's documents since costs are apportioned based upon percentage of common interest.

It would also increase the cost to the other association members who failed to "opt out."

Simplified example:

- a. Assume that each unit pays \$300 per month for association dues and there are 100 units.
- b. This provides income of \$30,000 in dues.
- c. Assume 10 units "opt out" into another association.
- d. The costs for payroll and various other expenses for the original association will be substantially the same.
- e. The units that opt out of the association will still use the elevator and common elements for access to their units.
- f. The remaining 90 units will need to fund the \$30,000 even though 10 units have opted out.
- g. This increases the required monthly fees for the remaining 90 units to \$333 per month, an immediate 11% increase.

There is a basic principle that must be presented. Units that receive the benefit of the common elements, through an easement or use of services (such as an elevator) should pay their fair share.

The forced removal of a unit from the association even though it benefits from common elements is an unfair assessment on the other units.

Even the assessment of the total amount among the two associations will lead to problems. Different boards may have different decisions about the financial amounts for the common areas.

8. The apportionment of costs to units based upon usage is usually done in isolated cases, e.g., separate metering for electricity or water. The charges for the common area usage still remain the same.
9. Some condominiums have a mixed use procedure, such as Century Square, wherein the commercial units have a different assessment schedule.

In this case the separate charges are disclosed within the association's documents.

Additionally the association's documents provide a clear identity for each unit, i.e., a unit belongs to a specific category with a specific percentage of common interest.

Any attempt to impose this system on existing associations would surely present a very complex and potentially litigious environment.

10. The previous issues lead to an alternative that could require new associations formed after a specific date to provide two separate classes of units, one with an "assisted living" feature and another without an "assisted living" feature.

The costs for the units that have "assisted living" would be calculated based upon the additional services provided.

Individuals who buy a unit without "assisted living" would be hindered if they eventually needed the "assisted living" service. The owner could be forced to sell their unit and obtain a unit with "assisted living."

Conclusion

The mandatory division of an association into two optional associations creates a series of complex additional issues. The failure to resolve these issues will lead to more uncertainty regarding association jurisdiction, services provided, cost allocations, and ultimately, an erosion of the fundamental concept of the common interest community.

Steve Glanstein

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EXHIBIT E

PROPOSED AMENDMENT TO CHAPTER 514A

§ 5-29.1. Aging in Place; Limitation on Liability. [Source: New.] (a) Problems that an elderly unit owner confronts with respect to aging and to aging in place include, but are not limited to:

- (1) Being unable to clean and maintain an independent unit.
- (2) Being mentally confused.
- (3) Being abusive to others.
- (4) Being unable to care appropriately for oneself.
- (5) Being unable to arrange for home care.
- (6) Being unable to arrange for home care.
- (7) Making inappropriate requests of others for assistance.

Barriers that an association, its board, unit owners, and their agents and tenants confront with respect to an elderly unit owner who is experiencing one or more of the above noted problems are:

- (1) An elderly unit owner who is afraid to talk about the owner's problems.
- (2) Denial by an elderly unit owner that a problem exists.
- (3) An inability to assess reported problems with an elderly unit owner and an inability to recommend programs and services to help an elderly unit owner alleviate a problem or problems with respect to aging, aging in place and related elderly challenges.
- (4) Legal liability and much higher insurance costs for all involved if owners and residents, through the board, attempt to assess problems and to see that services are provided for an elderly unit owner.
- (5) An inability to present in a legal forum, if needed, recommended programs and services for those elderly unit owners who are experiencing physical and cognitive disabilities and chronic health problems that make it difficult for such an elderly unit owner to live independently in the owner's unit without help, and without posing any harm to self or to others, and without being disruptive to the condominium community.

This section is intended to provide a remedy for such barriers.

(b) *No liability for reports, observations, complaints and recommendations.* The association, its directors, unit owners, and their agents and tenants, acting through the board, shall not have any legal responsibility or legal liability, with respect to any actions and recommendations the board takes on any report, observation, or complaint made, or with respect to any recommendation or referral given, which relates to an elderly unit owner who, because of the problems of aging and aging in place enumerated in subsection (a), may require services and assistance to maintain independent living in the unit in which the elderly owner resides so that the resident will not pose any harm to self or to others, and will not be disruptive to the condominium community.

(c) *No liability for assessments and recommendations.* Upon a report, observation or complaint relating to an elderly owner aging or aging in place which notes a problem similar in nature to the problems enumerated in subsection (a), the board may, in good faith, and without legal responsibility or liability, request a functional assessment regarding the condition of an elderly unit owner as well as recommendations for the services which the elderly owner may require to maintain a level of independence that enables such owner to avoid any harm to self or to others, and to avoid disruption to the condominium community. The board may, upon request, or unilaterally, and without legal responsibility or liability, recommend available services to an elderly owner which might enable such elderly owner to maintain a level of independent living with assistance, enabling in turn, such elderly owner to avoid any harm to self or others, and to avoid disruption to the condominium community.

(d) *No affirmative duty regarding assessments and recommendations.* There is no affirmative duty on the part of the association, its board, the unit owners, or their agents or tenants to request or require an assessment and recommendations with respect to an elderly unit owner when the owner may be experiencing the problems related to aging and aging in place enumerated in subsection (a). The association, its board, unit owners, and their agents and tenants are not legally responsible or liable for not requesting or declining to request a functional assessment of, and recommendations for, an elderly owner regarding problems relating to aging and aging in place.

(e) *No liability for actions filed.* In the event an elderly unit owner ignores or rejects a request for, or the results from, an assessment and recommendations, the association, with no liability for cross-claims or counterclaims, may file appropriate information, pleadings, notices, or the like, with appropriate agencies or courts to seek an appropriate resolution for the condominium community and for the elderly owner.

(f) Costs and fees for assessments, recommendations, and actions contemplated in this section shall be as set forth in the declaration or bylaws.

(g) This section shall not be applicable to any condominium that seeks to become licensed as an assisted living facility pursuant to chapter 90, title 11, Hawaii Administrative Rules, as amended.

DRAFT